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No. 84-1646

In the Supreme Court of the United States

OCTOBER TERM, 1984

AUGUST CARL BENZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's failure to disclose vouchers reflecting payments to a witness was harmless error where government witnesses testified about the payments at trial.

2. Whether the trial court's instruction that the jury disregard the nonresponsive answer of a witness cured any prejudice from the witness's comment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 740 F.2d 903.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1984. A petition for rehearing was denied on February 19, 1985 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on April 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to import marijuana and to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846 and 963, and on one count of submitting a

false statement, in violation of 18 U.S.C. 1001. He was sentenced to concurrent terms of imprisonment of five years on the conspiracy count and one year on the false statement count. The court of appeals affirmed (Pet. App. A1-A19).

The evidence at trial, as summarized by the court of appeals (Pet. App. A2-A5), is as follows: petitioner was a member of a drug smuggling conspiracy that imported thousands of pounds of marijuana from the Lesser Antilles to Florida aboard petitioner's sailboat. After the smugglers had unloaded the marijuana, they left the boat in waters off the Florida coast. Customs officers later discovered the abandoned boat and, upon finding marijuana residue on its deck, seized the vessel. After petitioner was notified of the seizure, he moved for remission or mitigation of the forfeiture, falsely contending that the boat had been chartered to "Edgar Picado" at the time of the seizure. In fact, co-conspirator Laurie Miller had forged the signature of "Edgar Picado" on the charter agreement.

ARGUMENT

1. Petitioner contends (Pet. 14-23) that, despite his request for discovery, the government withheld exculpatory evidence. This contention lacks merit.

The prosecution's response to petitioner's general pretrial request for discovery did not include production of certain receipts issued by the Drug Enforcement Administration (DEA). During the trial, however, Jim Hunt, an accomplice, and DEA Agent Haines, both testifying for the government, acknowledged on cross-examination that the DEA had made payments to Hunt for subsistence and expenses (Pet. App. A17). Petitioner never asked for production of the receipts reflecting those payments, but his counsel "delved thoroughly and extensively into the amounts and nature of the payments, and argued them to the jury as Hunt's 'license to lie.' " *Ibid.* After trial, petitioner obtained copies of the DEA receipts when they were

provided to a co-conspirator. The receipts are preprinted with the term "purchase of information/evidence transaction" across the top and they indicate that DEA paid Hunt for "information." Pet. App. A16-A18; *id.* at C3-C9. Petitioner contends that he was entitled to obtain these receipts for use at trial.

When a defendant makes a general request for exculpatory material and the material is not provided, he is not entitled to a new trial unless the material creates a reasonable doubt that did not otherwise exist. *United States* v. *Agurs,* 427 U.S. 97, 112 (1976). That is precisely the standard the court of appeals employed (Pet. App. A17) in concluding that the DEA receipts would not have created a reasonable doubt of petitioner's guilt. Thus, the petition involves the application of settled principles of law to the particular facts of this case.

In any event, the substance of the vouchers—the DEA payments to Hunt—was explored at length during the trial. It is true that the witnesses characterized the payments as expenses while the forms described them as payment for information, but as the court of appeals noted (Pet. App. A17-A18), the term "purchase of information" on the standard receipt form "would likely have been explained as a usual administrative classification of witness payments." Indeed, the government would hardly use a preprinted term on the receipt that carried the sinister connotation that petitioner ascribes to it. When viewed in the context of the evidence of petitioner's guilt, the court of appeals was plainly correct in holding that the omission of the receipts—which would have added nothing material to the evidence already before the jury—did not create a reasonable doubt. See, *e.g., United States* v. *Farid,* 733 F.2d 1318, 1320-1321

(8th Cir. 1984); *United States* v. *Sperling*, 726 F.2d 69, 72 (2d Cir. 1984), cert. denied, No. 83-1828 (June 11, 1984).[1]

2. Petitioner also contends (Pet. 24-26) that a nonresponsive answer by a witness was prejudicial and that the court's instruction to the jury to disregard the comment was an inadequate cure. This contention lacks merit.

On cross-examination, petitioner's counsel asked Hunt for the date on which he began his sailmaking business. Hunt was unsure of the date, but said that it was the same month Hunt's partner took " 'his boat down to Columbia with Carl and Tom something, to go and pick up a load.' "

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[1]Petitioner does not have a valid claim under the Jencks Act, 18 U.S.C. 3500, because he failed to demand the receipts following the direct examination of Hunt or Haines. *United States* v. *Petito*, 671 F.2d 68, 73-74 (2d Cir.), cert. denied, 459 U.S. 824 (1982); *United States* v. *Lemus*, 542 F.2d 222, 223 (4th Cir. 1976), cert. denied, 430 U.S. 947 (1977). Although petitioner contends that he relied upon the prosecutor's pretrial assertion that all Section 3500 statements had been delivered to the defense, and thus made no demand at trial, this reliance was unreasonable under the circumstances. The prosecutor's statement that all Section 3500 statements were delivered to the defense occurred during a discussion concerning whether petitioner's counsel might be a witness and was intended merely to advise the court that the defense had enough information to evaluate the decision to have the attorney testify (35 R. 8-19). Nothing in the prosecutor's statement was intended to relieve counsel from requesting Section 3500 statements during trial. And once Haines and Hunt testified about the payments, petitioner should have known that the government would have some record of the disbursements. Accordingly, petitioner should have requested the receipts at trial after Hunt's and Haines' direct examination. In any event, for the reasons stated above, the failure to produce the receipts was harmless and did not affect the fairness of the trial. *United States* v. *Phillips*, 482 F.2d 1355, 1356-1357 (9th Cir. 1973), cert. denied, 419 U.S. 847 (1974) (FBI payment receipts). See also *United States* v. *Del Toro Soto*, 728 F.2d 44, 48 (1st Cir. 1984); *United States* v. *Wables*, 731 F.2d 440, 448-449 (7th Cir. 1984). Finally, petitioner has no claim under Rule 16, Fed. R. Crim. P., because that rule incorporates the limitations of the Jencks Act on discovery of witness statements. Fed. R. Crim. P. 16(a)(2).

Pet. App. A18. Petitioner's counsel immediately objected and requested a mistrial. The court denied the mistrial motion but struck the answer from the record and instructed the jury to disregard it (*ibid.*).

It is of course within the discretion of the trial judge whether to grant a mistrial, because he is in the best position to evaluate the effect on the jury of events at trial. *United States* v. *Laymon,* 621 F.2d 1051, 1053 (10th Cir. 1980). For that reason, the trial court's determination whether a mistrial is warranted is entitled to special weight. *Arizona* v. *Washington,* 434 U.S. 497, 510 (1978). "A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have broad powers to cope with the complexities and contingencies inherent in the adversary process." *Geders* v. *United States,* 425 U.S. 80, 86 (1976); see also *Quercia* v. *United States,* 289 U.S. 466, 469 (1933). Ordinarily, the effect of even improper evidence can be remedied by admonishing the jury to disregard it. See *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 644 (1974); *Frazier* v. *Cupp,* 394 U.S. 731, 735-736 (1969); *Throckmorton* v. *Holt,* 180 U.S. 552, 567 (1901). It is, of course, presumed that the jury will obey the court's instruction. See *Tennessee* v. *Street,* No. 83-2143 (May 13, 1985), slip op. 5, 7-8; *Francis* v. *Franklin,* No. 83-1590 (Apr. 29, 1985), slip op. 16 n.9; *Shotwell Manufacturing Co.* v. *United States,* 371 U.S. 341, 367 (1963). In any event, as the court of appeals correctly found, Hunt's vague and fleeting remark was not prejudicial to petitioner. And in view of the ample evidence of petitioner's guilt, any error was harmless. See *United States* v. *Hasting,* 461 U.S. 499 (1983).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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